

DISTRICT OF NEVADA

Ditech and Fannie Mae oppose Paradise's motion and also move for summary judgment. They argue that because Fannie Mae owned the note and deed of trust at the time of the foreclosure sale, the sale could not have extinguished Fannie Mae's interest under the federal foreclosure bar. Alternatively, they argue the sale violated their due process rights, they extinguished the superpriority lien by offering to pay the superpriority amount, and the sale should be equitably set aside.

1 Ditech and Fannie Mae have standing, Paradise has not shown I should reconsider Judge
2 Mahan's prior ruling that the remaining claims are timely, and the federal foreclosure bar
3 applies. I therefore grant Ditech and Fannie Mae's motion and deny Paradise's motion.

4 **I. BACKGROUND**

5 In August 2003, former homeowner Emily Razzano obtained a loan in the amount of
6 \$175,000 and executed a deed of trust to secure the loan. ECF Nos. 42-1; 42-5 at 4. The deed of
7 trust was recorded in early September 2003. ECF No. 42-1. That same month, Fannie Mae
8 acquired ownership of the loan and the deed of trust and has remained the owner ever since. ECF
9 Nos. 42-2 at 3; 42-5 at 6. In May 2012, Bank of America, N.A. was Fannie Mae's servicer on
10 the loan. ECF Nos. 42-2 at 4; 42-5 at 6. A year later, the loan servicing rights were transferred to
11 Ditech. ECF Nos. 42-2 at 4; 42-5 at 7.

12 In September 2011, Paradise, acting through its agent defendant Nevada Association
13 Services, Inc. (NAS), recorded a notice of delinquent assessment lien because Razzano had
14 failed to pay her homeowners association (HOA) assessments. ECF No. 42-8. Paradise
15 subsequently recorded a notice of default and election to sell and a notice of foreclosure sale.
16 ECF Nos. 42-9; 42-10. Paradise purchased the property for \$9,280.67 at the HOA foreclosure
17 sale held on May 4, 2012. ECF No. 42-11. In August 2015, Paradise quitclaimed the property to
18 Wang and Barber. ECF No. 42-12.

19 Ditech and Fannie Mae filed this lawsuit against Paradise, NAS, Wang, and Barber,
20 seeking to quiet title and obtain declarations that the deed of trust still encumbers the property
21 following the HOA foreclosure sale or that the sale be set aside. Ditech and Fannie Mae also
22 asserted two claims seeking money damages against Paradise and NAS: breach of Nevada
23 Revised Statutes § 116.1113 and wrongful foreclosure.

1 Paradise moved to dismiss the damages claims as time-barred and to dismiss the quiet
2 title and declaratory relief claims on the merits. ECF No. 7. Judge Mahan, who previously
3 presided over this case, dismissed the two damages claims but denied the motion as to the
4 declaratory relief and quiet title claims. ECF No. 19. Although Paradise did not move to dismiss
5 those claims on statute of limitations grounds, Judge Mahan identified the claims as ones brought
6 pursuant to Nevada Revised Statutes § 40.010. *Id.* He stated that those claims are governed by a
7 five-year limitation period, and thus are timely. *Id.* He also rejected Paradise's arguments to
8 dismiss the quiet title and declaratory relief claims on the merits. *Id.*

9 Defendants Wang and Barber subsequently filed an answer and crossclaims against
10 Paradise and NAS. ECF No. 22. Judge Mahan dismissed the crossclaims without prejudice. ECF
11 No. 31. Wang and Barber have not moved to amend their crossclaims.

12 NAS has never appeared in this action. Ditech and Fannie Mae moved for entry of
13 clerk's default, which was entered on April 11, 2017. ECF Nos. 27, 28.

14 Accordingly, the remaining claims in this action are Ditech and Fannie Mae's declaratory
15 relief and quiet title claims. Both sides now move for summary judgment. For the reasons set
16 forth below, I grant Ditech and Fannie Mae's motion for summary judgment and deny Paradise's
17 motion.

18 **II. ANALYSIS**

19 Summary judgment is appropriate if the movant shows "there is no genuine dispute as to
20 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
21 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law."
22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if "the evidence
23 is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

1 The party seeking summary judgment bears the initial burden of informing the court of
2 the basis for its motion and identifying those portions of the record that demonstrate the absence
3 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The
4 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a
5 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531
6 (9th Cir. 2000). I view the evidence and reasonable inferences in the light most favorable to the
7 non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir.
8 2008).

9 **A. Paradise's Motion for Summary Judgment**

10 1. Standing

11 Paradise argues Ditech lacks standing to bring its claims because it did not own an
12 interest in the property at the time of the HOA foreclosure sale and does not claim to own an
13 interest now. Ditech responds that as Fannie Mae's servicer, it has standing to defend Fannie
14 Mae's interests.

15 Ditech has standing in this case as Fannie Mae's servicer. *See e.g., Saticoy Bay, LLC*
16 *Series 2714 Snapdragon v. Flagstar Bank, FSB*, 699 Fed. App'x 658 (9th Cir. Oct. 20, 2017)
17 (holding a loan servicer acting as Fannie Mae's agent may assert federal preemption); *Nationstar*
18 *Mortgage, LLC v. SFR Investments Pool 1, LLC*, 396 P.3d 754, 758 (Nev. 2017) (en banc)
19 (same). I therefore deny this part of Paradise's motion.

20 2. Statute of Limitations

21 Paradise argues that because Judge Mahan dismissed the damages claims as time-barred,
22 the declaratory relief claims against Paradise are also time-barred because "where legal and
23 equitable claims coexist, equitable remedies will be withheld if an applicable statute of

1 limitations bars the concurrent legal remedy.” ECF No. 43 at 4. Ditech and Fannie Mae respond
2 that their quiet title and declaratory relief claims seek different relief than the wrongful
3 foreclosure and § 116.1113 claims, so the same statute of limitations does not apply.

4 Judge Mahan already ruled Ditech and Fannie Mae’s remaining claims are timely. ECF
5 No. 19 at 5. Paradise thus is essentially requesting reconsideration of that decision. A district
6 court “possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory
7 order for cause seen by it to be sufficient,” so long as it has jurisdiction. *City of L.A., Harbor*
8 *Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (quotation and emphasis
9 omitted); *see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983)
10 (citing Fed. R. Civ. P. 54(b)). “Reconsideration is appropriate if the district court (1) is
11 presented with newly discovered evidence, (2) committed clear error or the initial decision was
12 manifestly unjust, or (3) if there is an intervening change in controlling law.” *Sch. Dist. No. 1J,*
13 *Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A district court also
14 may reconsider its decision if “other, highly unusual, circumstances” warrant it. *Id.*

15 “A motion for reconsideration is not an avenue to re-litigate the same issues and
16 arguments upon which the court already has ruled.” *In re AgriBioTech, Inc.*, 319 BR 207, 209
17 (D. Nev. 2004). Additionally, a motion for reconsideration may not be based on arguments or
18 evidence that could have been raised previously. *See Kona Enters., Inc. v. Estate of Bishop*, 229
19 F.3d 877, 890 (9th Cir. 2000).

20 Paradise could have challenged the remaining claims as untimely in its motion to dismiss
21 but did not do so. Reconsideration therefore is not warranted. Moreover, Paradise does not
22 identify any newly discovered evidence or intervening change in controlling law to support its
23 position.

1 Paradise's argument for applying a three-year limitation period does not show Judge
2 Mahan's prior ruling was manifestly unjust or clear error. Paradise cites to *Levald, Inc. v. City of*
3 *Palm Desert* for the proposition that because Ditech and Fannie Mae's legal claims for damages
4 are subject to a three-year limitation period and thus untimely, the "concurrent" equitable claims
5 are as well. *Levald* rejected an argument that a statute of limitations does not apply to
6 declaratory relief claims. 998 F.2d 680 (9th Cir. 1993). In doing so, that court stated:

7 To prevent plaintiffs from making a mockery of the statute of
8 limitations by the simple expedient of creative labelling—styling
9 an action as one for declaratory relief rather than for damages—
10 courts must necessarily focus upon the substance of an asserted
11 claim as opposed to its form. It is settled, therefore, that where
12 legal and equitable claims coexist, equitable remedies will be
13 withheld if an applicable statute of limitations bars the concurrent
14 legal remedy. . . . Therefore, if a claim for declaratory relief could
15 have been resolved through another form of action which has a
16 specific limitations period, the specific period of time will govern.

17 *Id.* at 688 (quotations and citations omitted).

18 *Levald* does not have the effect Paradise claims in this case. Ditech and Fannie Mae's
19 quiet title and declaratory relief claims are not creative re-labeling of their damages claims. The
20 wrongful foreclosure and § 116.1113 claims were for damages against Paradise and its agent for
21 allegedly conducting an improper foreclosure. The quiet title and declaratory relief claims seek
22 to determine interests in the property. Prevailing on the damages claims would not necessarily
23 have entitled Ditech and Fannie Mae to the equitable relief they seek in their declaratory relief
24 and quiet title claims, and vice versa.

25 The statute of limitations is an affirmative defense, so Paradise bears the burden of
26 proving it applies. *See Nev. R. Civ. P. 8(c)* (listing the statute of limitations as an affirmative
27 defense); *Nev. Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 338 P.3d 1250, 1254 (Nev. 2014) (en
28 banc) (stating that the party asserting an affirmative defense bears the burden of proving each

1 element of the defense); *Hubbard v. State*, 877 P.2d 519, 522 (Nev. 1994) (holding, in the
2 context of a criminal case, that the statute of limitations is an affirmative defense). Paradise has
3 not shown that merely because Ditech and Fannie Mae also asserted damages claims, the quiet
4 title and declaratory relief claims should be subject to a three-year limitation period. I therefore
5 deny this portion of Paradise’s motion.

6 3. Other Arguments

7 Paradise raises other issues in its summary judgment motion, such as whether the HOA
8 sale violated due process or should be equitably set aside. As discussed below, the federal
9 foreclosure bar resolves the question of whether the deed of trust still encumbers the property.
10 Thus, I need not address these issues.

11 **B. Ditech and Fannie Mae’s Motion for Summary Judgment**

12 The federal foreclosure bar in 12 U.S.C. § 4617(j)(3) provides that “in any case in which
13 [the Federal Housing Finance Agency (FHFA)] is acting as a conservator,” “[n]o property of
14 [FHFA] shall be subject to . . . foreclosure[] or sale without the consent of [FHFA].” The
15 question of whether the federal foreclosure bar preserves Fannie Mae’s interest in this property is
16 controlled by *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017). In that case, the Ninth Circuit
17 held that the federal foreclosure bar preempts Nevada law and precludes an HOA foreclosure
18 sale from extinguishing Fannie Mae’s interest in property without FHFA’s affirmative consent.
19 *Id.* at 927-31; *see also Fed. Home Loan Mortg. Corp. v. SFR Investments Pool 1, LLC*, No. 16-
20 15962, --- F.3d ----, 2018 WL 3097719, at *6-7 (9th Cir. June 25, 2018) (same).

21 Additionally, the *Berezovsky* court accepted as proof of ownership the same type of
22 evidence offered in this case. 869 F.3d at 932-33. Paradise, Wang, and Barber do not dispute
23 that Fannie Mae owned an interest in the loan and deed of trust at the time of the HOA

1 foreclosure sale. Indeed, they offer no evidence or argument in response to Ditech and Fannie
2 Mae's federal foreclosure bar argument. They therefore have not raised a genuine dispute that
3 Fannie Mae had an ownership interest in the loan and deed of trust at the time of the HOA
4 foreclosure sale.

5 The federal foreclosure bar precludes the HOA foreclosure sale from extinguishing
6 Fannie Mae's interest in the property, so the HOA sale did not convey the property to Wang and
7 Barber free and clear of the deed of trust. I therefore grant Ditech and Fannie Mae's motion for
8 summary judgment.¹

9 **III. CONCLUSION**

10 IT IS THEREFORE ORDERED that defendant Paradise Springs One Homeowners
11 Association's motion for summary judgment **(ECF No. 43) is DENIED.**

12 IT IS FURTHER ORDERED that plaintiffs Ditech Financial LLC and Federal National
13 Mortgage Association's motion for summary judgment **(ECF No. 42) is GRANTED.** It is
14 hereby declared that the homeowners association's non-judicial foreclosure sale conducted on
15 May 4, 2012 did not extinguish Federal National Mortgage Association's interest in the property
16 located at 5462 Birchbrook Court in Las Vegas, Nevada, and thus the property is subject to the
17 deed of trust for which Ditech Financial LLC is the current beneficiary of record.

18 IT IS FURTHER ORDERED that the clerk of court is instructed to close this case.

19 DATED this 16th day of July, 2018.

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21 _____
22 ANDREW P. GORDON
23 UNITED STATES DISTRICT JUDGE

23 ¹ Because I grant Ditech and Fannie Mae's motion on this basis, I need not address their other
declaratory relief and quiet title claims related to due process.